United States Department of Labor
Employees' Compensation Appeals Board

F.C., Appellant	)	
and	)	**Docket No. 08-1186**
	)	**Issued: November 25, 2008**
DEPARTMENT OF AGRICULTURE, CARSON NATIONAL FOREST, Taos, NM, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 17, 2008 appellant filed a timely appeal of the Office of Workers' Compensation Programs' decisions dated July 31 and December 18, 2007, which found his wage-earning capacity was represented by the constructed position of cashier. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly reduced appellant's compensation based on its determination that the constructed position of cashier represented his wage-earning capacity; and (2) whether the Office properly denied modification of appellant's loss of wage-earning capacity determination.

FACTUAL HISTORY

On June 14, 2000 appellant, then a 53-year-old firefighter, sustained injury to his back after carrying a bag of water to a fire line. By letter dated January 4, 2001, the Office accepted his claim for thoracic and lumbar strains. The claim also later accepted for aggravation and

displacement of an intervertebral disc. Appropriate compensation and medical benefits were paid.

In a January 22, 2004 medical report, Dr. David R. Cesko, an attending Board-certified family practitioner, opined that appellant's back condition resulted from his work injury. He advised that appellant was incapable of pursuing meaningful employment.

By letter dated September 9, 2004, the Office referred appellant to Dr. W. Carlton Reckling, a Board-certified orthopedic surgeon, for a second opinion. In a September 27, 2004 medical report, Dr. Reckling diagnosed lumbar spondylosis; lumbar disc protrusion at L4-5 and L5-S1; left leg radiculitis; and chronic low back pain. He opined that the June 14, 2000 injury caused damage to the L4-5 and L5-S1 discs. Due to his injury appellant had ongoing back and left leg symptoms. Dr. Reckling opined that appellant's current condition was directly related to the accepted injury. He noted that appellant was not capable of returning to his date-of-injury work position and that he was unable to ascertain whether he could work in any position. Dr. Reckling recommended that appellant undergo a functional capacities evaluation.

On December 15, 2004 the Office referred appellant to Shriver Therapy Group for a functional capacity evaluation. On January 18, 2005 a physical therapist stated that the tests results reviewed that appellant was unable to return to his previous job due to his inability to lift, carry, stand dynamically or work in a bent or stooped position. The therapist recommended that appellant enter a formal work conditioning program.

On February 4, 2005 Dr. Reckling reviewed the functional capacity results and advised that appellant advised that appellant could return to work with physical restrictions. In an attached form, he found that appellant could work for 4 hours and 12 minutes a day. Appellant could sit for 57 minutes at a time for a total of 2 hours and 23 minutes a day, could walk for 29 minutes a day and could stand for 43 minutes. Pushing was limited to 36 to 45 pounds, pulling limited to 40 to 43 pounds and lifting limited to 30 pounds. Dr. Reckling noted that appellant needed to change positions frequently and to alternate standing and sitting.

In a report dated August 15, 2005, Dr. Cesko reviewed appellant's treatment of approximately three years. He advised that appellant was unable to stand for more than 30 minutes at a time, unable to climb ladders, unable to stoop, bend or carry more than 10 to 15 pounds. Dr. Cesko opined that appellant remained disabled and in need of vocational rehabilitation.

The Office found a conflict of medical opinion between Drs. Cesko and Reckling with regard to appellant's disability and capacity for employment. By letter dated September 9, 2005, it referred appellant to Dr. Mark Rangitsch, a Board-certified orthopedic surgeon, for an impartial medical examination. In an October 3, 2005 medical report, Dr. Rangitsch diagnosed lumbar disc disease with disc injury from the June 14, 2000 injury. He opined that appellant had preexisting degenerative disc disease, which was aggravated by his accepted injury.

Dr. Rangitsch found that appellant had decreased strength in his left lower extremity and decreased range of motion. He advised that appellant did not have resolution of his symptoms. With regard to the conflict in medical opinion Dr. Rangitsch stated:

> "The only real conflicting medical report is whether [appellant] can lift up to 30 pounds or 10 [to] 15 pounds and whether he can work for an extended period of time of greater than [eight] hours, *etc.* On reviewing the functional capacity evaluation which Dr. Reckling based his restrictions on, it appears that [appellant] was able to lift up to approximately 30 pounds on an infrequent basis. Dr. Cesko indicated only 10 [to] 15 pounds. It is likely that [appellant] may be able to lift up to 25 [to] 30 pounds on a very infrequent basis. As to working an [eight-]hour workday, on reviewing the functional capacity evaluation, it appears that this would be difficult for him. [Appellant] is not able to sit for any longer than an hour at a time. He is not able to walk for more than an hour in an [eight-]hour day and he is not able to do many things, including kneeling, climbing, squatting, sitting for prolonged periods and again, carrying or lifting anything with substantial consistency. It is my opinion that he can do, at best, light to sedentary type work. Whether or not [appellant] is able to be vocationally retrained for any type of activity is, in my opinion, not likely. He is now 59[-]years[-]old, obtained only a GED and has not had any other formal education. Therefore, I think it is not likely that vocational rehabilitation will find him a job of any substance. It is likely therefore that [appellant] is permanently disabled and unable to return to the job force."

In response to the Office's December 8, 2005 request for clarification, on December 9, 2005 Dr. Rangitsch stated that appellant could work in a sedentary position for eight hours a day if he were able to get up and move around. On February 10, 2006 he advised that appellant could work in a sedentary position for four hours a day and lift up to 30 pounds on an infrequent basis.

In an October 3, 2006 report, Dr. Cesko advised that appellant was anticipating surgery. He found that appellant was incapable of going through vocational rehabilitation due to his frequent visits to the neurosurgeon and pain clinic. Dr. Cesko noted that, following surgery, appellant would be evaluated with regard to possible rehabilitation. On a January 4, 2007 report he reiterated that appellant remained totally disabled. Appellant was unable to sit more than 15 to 20 minutes, unable to stand for more than 15 to 20 minutes and unable to walk greater than half a block. Dr. Cesko opined that appellant was not capable of employment for even one or two hours a day.

In an April 5, 2007 memorandum, a vocational counselor noted that vocational rehabilitation efforts were unsuccessful. He listed several jobs as being within the restrictions set forth by Dr. Rangitsch, including that of cashier. The vocational counselor advised that the position of cashier was available in high numbers in appellant's commuting area and that the lower level of specific vocational preparation and high turnover rate would allow him to obtain such work. He found that appellant could work as a cashier for a 20-hour week and earn $136.60. The vocational counselor noted that the position of cashier, Department of Labor, *Dictionary of Occupational Titles* (DOT) No. 211.462.010, was responsible for receiving cash

from customers or employees in payment for goods and services. Some of the duties of a cashier involved operating a cash register, making change, operating a ticket-dispensing machine and verifying cash on hand. The physical demands of this job involved lifting 20 pounds occasionally and less than 10 pounds frequently.

By letter dated May 23, 2007, the Office referred appellant for a second opinion to Dr. Hendrick J. Arnold, a Board-certified orthopedic surgeon. In a report dated June 18, 2007, Dr. Arnold advised that appellant could perform the duties of cashier but that he would need a period of work hardening. He recommended that appellant start at four hours a day and work up to six hours and perhaps eight hours a day. Appellant would have to be able to alternate standing and sitting to stretch and take breaks. Dr. Arnold did not believe that appellant was a good candidate for surgery and opined that the aggravation of a preexisting degenerative disease was permanent.

By letter dated June 26, 2007, the Office proposed reducing appellant's compensation to reflect his capacity to earn wages as a cashier at a rate of $136.00 per week.

In response, appellant submitted medical reports dated June 26 and July 5, 2007 from Dr. Jon McMillan, who noted that appellant had low back pain secondary to facet arthrosis and Grade 1 spondylolisthesis at L4-5.

In a July 31, 2007 decision, the Office reduced appellant's wage-loss benefits effective August 5, 2007, based on his capacity to perform work as a cashier. It determined that appellant had a loss in wage-earning capacity of $229.89 per week or a compensation rate of $199.25 per week.[1]

On August 21, 2007 appellant requested a review of the written record by an Office hearing representative. He submitted medical reports from Dr. McMillan dated July 19 through October 15, 2007. Dr. McMillan reiterated that appellant had Grade 1 spondylolisthesis at L4-5 and facet degenerative arthrosis at L3-4, L4-5 and L5-S1. He also noted that appellant had Vitiligo, which appellant attributed to chemical exposure during firefighting.

In an August 5, 2007 letter, Dr. Arnold responded to an injury from appellant noting his role as an impartial medical examiner. He advised that appellant had back pain but noted that he could perform the positions listed, which were very flexible and nonmanual. Dr. Arnold reiterated that appellant could not return to firefighting.

By decision dated December 18, 2007, the hearing representative affirmed the July 31, 2007 decision.

[1] The Office noted appellant's weekly pay rate when injured (June 15, 2000) was $338.08. It noted that the current pay rate for the job and step when injured is $422.31 (effective April 19, 2007). The Office noted that, as appellant was capable of earning $136.60 per week, the percentage of new wage-earning capacity was 32 percent ($136.60 divided by $422.31). It then determined that the adjusted wage-earning capacity amount per week was $108.19 (32 percent of $338.08), which resulted in a loss of wage-earning capacity of $229.89 per week ($338.08 minus $108.19). As appellant was paid at a rate of 75 percent, this resulted in a compensation rate of $172.42 per week, which the Office increased by applicable cost-of-living adjustments to $199.25 per week.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[2]

Section 8115(a) of the Federal Employees' Compensation Act[3] provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity.[4] Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.[5] If the actual earnings do not fairly and reasonably represent wage-earning capacity or the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.[6] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[7] The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.[8] In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.[9] The Board has held that the Office must address the issue and explain why a part-time position is suitable for a wage-earning capacity determination based on the specific circumstances of the case.[10]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's DOT or otherwise available in the open labor market, that fits that employee's capabilities with regard to his physical limitations, education, age and prior

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[2] *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

[3] 5 U.S.C. § 8115(a).

[4] *Id*. *Loni J. Cleveland*, 52 ECAB 171, 177 (2000).

[5] *Lottie M. Williams*, 56 ECAB 302 (2005); *see Edward Joseph Hanlon*, 8 ECAB 599 (1956).

[6] 5 U.S.C. § 8115; 20 C.F.R. § 10.520; *John D. Jackson*, 55 ECAB 465, 471 (2004); *Robert H. Merritt*, 11 ECAB 64, 65 (1959).

[7] *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

[8] *M.A.*, 59 ECAB ____ (Docket No. 07-349, issued July 10, 2008. The commuting area is to be determined by the employee's ability to get to and from the worksite. *See Glen L. Sinclair*, 36 ECAB 664, 669 (1985).

[9] *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

[10] *Connie L. Potratz-Watson*, 56 ECAB 316, 318 (2005).

experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the states employment service or other applicable service. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.[11]

Section 8123(a) of the Act provides that, when here is a disagreement between a physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[12] The opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[13]

ANALYSIS -- ISSUE 1

The Office found that appellant was capable of performing the duties of a cashier effective August 5, 2007. It relied upon the report of the impartial medical examiner, Dr. Rangitsch. The Board finds that the Office properly determined that appellant could perform this position.

As appellant's vocational rehabilitation was unsuccessful, the rehabilitation counselor determined that he could return to work as a cashier. He found that the position of cashier was medically and vocationally suitable for appellant and obtained information from a labor market survey to establish the availability and wage rate of the position.[14] Through contact with the vocational counselor, the Office determined that the constructed position of cashier reasonably represented appellant's wage-earning capacity. The vocational counselor identified the cashier position listed in the Department of Labor, Titles, DOT No. 211.462.010. He provided appropriate information regarding the position description, the availability of work positions within appellant's commuting area and pay ranges within the geographical area. The position was found within appellant's physical restrictions as set forth by Dr. Rangitsch, the impartial medical examiner. The vocational counselor also noted that the position was available in high numbers with a low level of specific vocational preparation.

A conflict in medical opinion arose between Dr. Cesko, appellant's physician, and Dr. Reckling, a second opinion physician, with regard to his disability and capacity for work. The Office properly referred him to Dr. Rangitsch for an impartial medical examination. Dr. Rangitsch found that appellant could work in a sedentary position for four hours a day and lift up to 30 pounds on an infrequent basis. As the opinion of the vocational counselor is well rationalized and based on a proper factual background, it is entitled to special weight.[15] The

[11] *N.J.*, 59 ECAB ___ (Docket No. 07-45, issued November 14, 2007); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick*, 5 ECAB 376 (1953).

[12] 5 U.S.C. § 8123(a); *Roger W. Griffith*, 51 ECAB 491, 504 (2000); *Joseph D. Lee*, 42 ECAB 172 (1990).

[13] *Solomon Polen*, 51 ECAB 341, 343 (2000).

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(b) (December 1995); *see also Dorothy Jett*, 52 ECAB 246 (2001).

[15] *Solomon Polen*, *supra* note 13.

position of cashier is within Dr. Rangitsch's physical restrictions. The vocational counselor determined that appellant could earn $136.60 per week, during a 20-hour work week.

The Board finds that the Office properly considered the availability of suitable employment and appellant's physical limitations, his usual employment and age and employment qualifications in determining that the position of cashier represented his wage-earning capacity. The weight of the evidence of record establishes that appellant has the requisite physical ability, skill and experience to perform the position of cashier. The position is reasonably available within the general labor market of his commuting area. The Office proper determined that the position of cashier reflected appellant's wage-earning capacity. Further, it properly applied the *Shadrick* formula[16] as codified at use at 20 C.F.R. § 10.403 in determining appellant's loss of wage-earning capacity.

LEGAL PRECEDENT -- ISSUE 2

Once the loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.[17] The burden of proof is on the party attempting to show modification of the award.[18]

ANALYSIS -- ISSUE 2

To establish modification of the wage-earning capacity, the issue is whether there has been a material change in his condition that would render him unable to perform those duties.[19] For a physician's opinion to be relevant on the issue, the physician must address the duties of the constructed position.[20]

Appellant submitted medical reports from noting that he had Grade 1 spondylosis, facet joint arthrosis and Vitiligo. However, Dr. McMillan did not address whether appellant can perform the position of cashier or whether there had been a material change in his accepted condition sufficient to overcome the well-rationalized opinion of the impartial medical examiner. Dr. Arnold's reports did not find that appellant could not work as a cashier. The medical evidence does not establish a material change in the nature and extent of the accepted medical condition. Appellant did not establish a basis for modification of the wage-earning capacity by submitting evidence establishing that he had been retrained or otherwise vocationally rehabilitated or that the original determination was, in fact, erroneous. He failed to meet his burden of proof to establish modification of the wage-earning capacity determination.

[16] *Albert C. Shadrick, supra* note 11.

[17] *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

[18] *Jack E. Rohrabaugh*, 38 ECAB 186, 190 (1986).

[19] *Phillip S. Deering*, 47 ECAB 692 (1996).

[20] *Id.*

CONCLUSION

The Board finds that the Office properly determined that the position of cashier reflects appellant's wage-earning capacity. The Board further finds that the Office properly denied modification of appellant's wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 18 and July 31, 2007 are affirmed.

Issued: November 25, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board